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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 385

WESTERN NEW YORK WATER COMPANY and NEW YORK WATER SERVICE CORPORATION,
Petitioners,

v.

ERIE COUNTY WATER AUTHORITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR ERIE COUNTY WATER AUTHORITY IN OPPOSITION

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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I

Opinion Below

The opinion of the Court of Appeals of the State of New York is reported in 304 N. Y. 342, 107 N. E. (2d) 479.

II

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on July 15, 1952 (R. 69, 70). The jurisdiction of this Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257, Subd. 3, and Section 2101, Subd. c.

III

Statutes Involved

Section 90, subd. 2, of the Judiciary Law of the State of of New York provides:

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.
>
> It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:
>
> a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court."

Rule V of Special Rules Applying to Attorneys adopted by the Appellate Division of the Supreme Court, Fourth Department, provides:

"PRELIMINARY INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS.

A petition for investigation of the conduct of a specified attorney or attorneys, or of the Bar generally, stating grounds therefor, may be presented to the Appellate Division by any person claiming to be aggrieved or by any duly constituted Bar Association within the Fourth Judicial Department. If the Appellate Division deems the grounds sufficient and the investigation warranted, it shall proceed to conduct such an investigation or order such an investigation to be conducted. The manner of conducting the investigation shall rest in the discretion of the Appellate Division. Such a petition may be presented where a duly constituted Bar Association has been unable to make a thorough investigation itself, either because of the inability to obtain the attendance of witnesses, or to obtain the testimony of witnesses or to obtain inspection of books and papers, or for any other sufficient reason, and the

Appellate Division will take into consideration such inability of any such Bar Association to make a thorough investigation in determining whether the Appellate Division will order an investigation.

Disciplinary proceedings against attorneys shall be instituted by verified petition, including or accompanying specific charges."

IV

Question Presented

As stated in the petition herein (pg. 5): "The question is: Was the refusal of the New York Court to disqualify the attorney from appearing in the cause a denial of due process?"

V

Statement of the Case

The Erie County Water Authority (hereinafter referred to as "the Authority") is a public benefit corporation created, organized and existing under and pursuant to Chapter 845 of the Laws of 1949 as repealed, reenacted and amended pursuant to Chapter 804 of the Laws of 1950, known as Title 3 of Article 5 of the Public Authorities Law of the State of New York, as further amended by Chapters 718, 719, 720 and 721 of the Laws of 1952.

The Authority, acting pursuant to the above statute, instituted a proceeding in the County Court of Erie County to acquire by condemnation the water plant and property of the petitioner Western New York Water Company (hereinafter referred to as "the Company"). The Authority retained Laurence J. Olmsted as special counsel to prepare for and try the said condemnation proceeding (R. 4).

When the Authority's petition for condemnation was presented to the County Court of Erie County (R. 7) counsel for the Company raised objections to the appearance of Olmsted and questioned the propriety of his right to act as trial counsel for the Authority (R. 15-17).

The Company's objections to Olmsted's participation in the condemnation proceeding stem from his former employment as an Assistant Counsel to the Public Service Commission of the State of New York and the fact that while so employed he participated in certain proceedings between 1947 and 1951, as the legal representative of the Commission, in which the Company was a party (R. 32-36; 46-48).

In connection with the objections raised Olmsted entered a special appearance (R. 13, 14) contending that the Appellate Division of the Supreme Court had paramount and exclusive jurisdiction of the matters raised by the Companies' objections (R. 17, 18). The County Court ruled that it had "jurisdiction to decide who is qualified to appear and who is disqualified to appear before the Court and I so hold" (R. 31).

After hearing the arguments and proofs of the Company, the County Court denied the application of the petitioners herein to bar Olmsted's participation in the proceeding as special counsel for the Authority (R. 3).

The order of the County Court (R. 3) was affirmed by the Appellate Division of the Supreme Court, Fourth Department, (R. 65) by a vote of 4 to 1. The affirmance was stated to be "on the sole ground that the Erie County Court had no jurisdiction to grant the relief sought" (R. 66). The dissent was stated to be on the ground "that the Court was without jurisdiction to entertain the matter or

to grant the relief sought and upon the further ground that the order was a nullity" (R. 66).

The Court of Appeals of the State of New York affirmed the order of the Appellate Division (R. 69), the majority of the Court pointing out that the Judiciary Law, § 90, subd. 2, conferred exclusive jurisdiction upon the Appellate Division of the Supreme Court to say what constitutes professional misconduct on the part of members of the bar, and the punishment to follow. The minority opinion took the view that the County Court of Erie County had inherent power to entertain and pass upon the Companies' motion and voted to remit the case to the Appellate Division to pass upon the facts.

ADDITIONAL COURT PROCEEDINGS SINCE THE ENTRY OF THE ORDER AND JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

The petitioners' "Statement of the Case" (Petition and Brief, pp. 5-10, inclusive) omits reference to or discussion of proceedings had before the Appellate Division of the Supreme Court after the decision of the Court of Appeals. The Authority's contention that the Appellate Division of the Supreme Court had exclusive and paramount jurisdiction to pass upon and determine the propriety of Olmsted's participation in the condemnation proceeding (R. 17, 18) was upheld by the Court of Appeals.

The petitioners herein made no attempt to present their objections to the Court having jurisdiction to pass upon them.

Mr. Olmsted, however, moved in the Appellate Division, Fourth Department, pursuant to its Rule V and Section 90, subd. 2, of the Judiciary Law that the Court investigate

and examine into the charges of alleged professional misconduct and conduct prejudicial to the administration of justice made against him, and that the Court thereafter make such further orders and directions as it felt necessary and proper in the premises. This application was made upon a verified petition and included as Exhibit I the Record on Appeal to the Court of Appeals sought to be certified to this Court. Notice of the application was given to the petitioners herein and to the Bar Association of Erie County.

There were thus presented to the Appellate Division of the Supreme Court, and upon notice to the objecting water companies, all of the claims, charges, assertions and proofs of the petitioners herein respecting Olmsted's alleged violation of the Canons of Ethics and Section 15 of the Public Service Law. Furthermore, the Court's attention was specifically directed to the language of Judge Conway's dissenting opinion in the Court of Appeals which was asserted as "an additional reason" for the disqualification of Olmsted. (See affidavit of Reid S. Moule attached hereto as Appendix II.)

The Appellate Division of the Supreme Court, Fourth Department, entertained Olmsted's application but denied his petition, stating in a memorandum decision:

> "On the basis of the records and papers before us, we see no reason for the inquiry sought by the petitioner."

(A certified copy of the order and memorandum of the Appellate Division is set forth at Appendix I hereof.)

The order of the Appellate Division, Fourth Department, (Appendix I hereof) is a final order of the Court of New York State having jurisdiction to pass upon the objections raised by the petitioners herein to Mr. Olmsted's participation in the condemnation proceeding.

VI

Objections Raised to Jurisdiction

Respondent respectfully urges that petitioners' application for a writ of certiorari should be dismissed for the following reasons:

1. The judgment of the Court of Appeals of the State of New York rests upon a non-federal ground adequate to support it.
2. The record does not show that the federal question presented by the petition was properly presented or expressly passed upon.
3. The remedies afforded by the Courts of New York State were not sought by petitioners.

VII

Argument

(1) The judgment of the Court of Appeals of the State of New York rests on a non-federal ground adequate to support it.

The Appellate Division of the Supreme Court having affirmed the order of the Erie County Court as a matter of law (R. 66) and without passing upon the facts there adduced, the jurisdiction of the Court of Appeals was limited to a question of law (Civil Practice Act, § 605, 606). It could affirm, as it did, upon the question of law, or, if it reversed or modified the determination of the Appellate Division, it was required to remit the case to that Court for its determination upon the questions of fact. On the record before it, the Court of Appeals was without jurisdiction to pass upon the facts.

While other jurisdictions recognize and give effect to an inherent power of the courts to establish standards of conduct for their officers and to deal with infractions thereof, in New York State, both by statute and judicial decision, the powers of the courts over attorneys are only such as have been delegated to them by the State Legislature.

In re Donegan, 282 N. Y. 285; 26 N. E. 2d 260;
People ex rel. Karlin v. Culkin, 248 N. Y. 462, 162 N. E. 487;
Matter of Robinson, 209 N. Y. 354, 103 N. E. 160;
Matter of Droege, 197 N. Y. 44, 90 N. E. 340;
Judiciary Law, § 90, subd. 2;
Rule V of Special Rules Applying to Attorneys adopted by Appellate Division, Fourth Department.

In New York State the Legislature has delegated to the Appellate Division of the Supreme Court power and control over attorneys and counsellors-at-law and its power to punish for professional misconduct and conduct prejudicial to the administration of justice is plenary and exclusive (Judiciary Law, § 90, subd. 2).

In re Ellis, 258 App. Div. 558, reversed on other grounds, 282 N. Y. 435, 26 N. E. 2d 967;
Matter of Cooper, 22 N. Y. 67;
Matter of Percy, 36 N. Y. 651.

The Court of Appeals correctly decided as a matter of State law that the grounds urged by the Company to disqualify Mr. Olmsted from appearing constituted charges of professional misconduct and conduct prejudicial to the administration of justice. The Court correctly held that the Appellate Division of the Supreme Court has exclusive jurisdiction to say what constitutes professional miscon-

duct and that jurisdiction of such a matter has not been committed by the Legislature to the county courts of New York State.

The decision of the Court of Appeals that the County Court of Erie County was without jurisdiction to "disqualify" Mr. Olmsted upon the grounds urged by the petitioners herein was not a denial of due process of law. It correctly stated the long established law of New York State that jurisdiction of the matters sought to be raised by the petitioners herein was not lodged in the County Court but in the Appellate Division of the Supreme Court.

It is well settled principle that this Court will not undertake to review a judgment of a State Court which rests upon a non-federal ground adequate to support it.

Maryland v. Baltimore Radio Show, 338 U. S. 912, 917, 918; 94 L. Ed. 562, 565, 566;
Young v. Ragen, 337 U. S. 235, 93 L. Ed. 1333;
Hamerstein v. Superior Court of California, 340 U. S. 622, 95 L. Ed. 586.

(2) The record herein does not show that the federal question was properly presented to or expressly passed upon by the Courts of New York State.

An examination of the record herein discloses that the violation of the constitutional rights now asserted by the petitioners herein was not presented to or passed upon by the Courts of New York State.

It appears from the opinions of the majority and minority members of the Court of Appeals that the sole issue there presented was the question whether the County Court of Erie County had inherent power to bar the appearance of Olmsted or whether the disqualification of an attorney

in a particular proceeding is a matter solely within the jurisdiction of the Appellate Division of the Supreme Court. No other question was presented, considered or passed upon by the Court of Appeals.

Furthermore, as appears from the affidavit of Reid S. Moule, (Appendix II) prepared and filed with the Appellate Division after the decision of the Court of Appeals, the constitutional question now asserted (due process of law) was relied upon as an *additional reason* for Olmsted's disqualification, aside from the grounds asserted and contained in the record sought to be certified to this Court.

Petitioners "Jurisdictional Statement" (Petition and Brief, pp. 2 and 3 and "Reasons Assigned for Granting Writ" Petition and Brief, pp. 10-16) fail to present the constitutional question asserted with the preciseness and clarity tional question asserted with the preciseness and clarity required by the Rules of this Court (Rule 12, paragraph 1; Rule 38, paragraph 2.) Petitioners' reference to the record (pp. 23 and 28) lead to counsel's comment that Canon 36 of the Canons of Ethics "and possibly a hundred or more statutes" combine to give expression to the principle of fair play in litigation. It is then repeatedly asserted that Canon 36 and Section 15 of the Public Service Law are but specific codifications declaratory of the principle of due process of law (Petition and Brief, pp. 5, 8, 10 and 16). To this conclusion, wholly unsupported by reference to the record or judicial decision, is added the statement that the violation of the declaratory statutes by Mr. Olmsted is evidence of the deprivation of petitioners' constitutional rights respecting due process of law (Petitioners' brief, pp. 5, 11 and 17).

The asserted constitutional question (due process of law) is wholly "fictitious" upon this record. It is created for the purpose of this application by strained and tortured

reasoning, combined with assertions of violations of law and ethics which are not supported by the facts of record herein. The County Court of Erie County, although without jurisdiction to pass upon petitioners' objections, made no finding that Olmsted violated either the Public Service Law or the Canons of Ethics. Indeed the County Court found upon petitioners' proof that Canon 36 had no application to the case (R. 6). On petitioners' appeals to the Appellate Division and to the Court of Appeals, neither Court passed upon the facts.

As pointed out herein, since the decision of the Court of Appeals, the Appellate Division of the Supreme Court has examined and passed upon all of the objections which these petitioners have raised respecting Olmsted's right to act as counsel for the Authority in its condemnation proceeding against the Company. It cannot be assumed that the Appellate Division of the Supreme Court refused to act upon the objections of these petitioners if the same required further action by that Court.

This Court has repeatedly held that a real and not a fictitious federal question is essential to the jurisdiction of the Supreme Court over the judgments of state courts. A general statement that the decision of a court was against the constitutional rights of a party, or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, will not raise a federal question.

Clarke v. McDade, 165 U. S. 168, 41 L. Ed. 673.

The constitutional question asserted by petitioners herein is without substance and merit and is wholly fictitious.

(3) The remedies afforded by the Courts of New York State have not been sought nor exhausted by the petitioners herein.

From the outset of the Companies' application to bar the appearance of Mr. Olmsted objection was taken to the jurisdiction of the County Court of Erie County and the contention made that the matters sought to be raised by the Companies were exclusively within the jurisdiction of the Appellate Division of the Supreme Court of the State of New York (R. 7). The Companies, however, sought to raise their objections before a court lacking jurisdiction to entertain or pass upon them and made no effort even after the decision of the Court of Appeals of the State of New York to present their objections to the Court of New York State having paramount and exclusive jurisdiction of the same.

Since the decision of the Court of Appeals, although no mention of the fact is made by the petitioners herein, all of their objections which have been raised to Mr. Olmsted's appearance have, upon his application, been presented to and decided by the Appellate Division of the Supreme Court of the State of New York and of which these petitioners were given notice. The fact that the petitioners herein have mistaken the remedy which they pursued in the Courts of New York State is not a ground for the interference of this Court as a denial of the constitutional rights asserted by the petitioners herein.

Market Street R. Co. v. Railroad Commission of California, 324 U. S. 548, 559; 89 L. Ed. 1171, 1180.

Conclusion

Respondent therefor urges that the writ prayed for herein be denied.

Dated: November 3, 1952.

Respectfully submitted,

MELVIN L. BONG,
386 Ellicott Square Building,
Buffalo, New York,
Attorney for Respondent.

LAURENCE J. OLMSTED,
Buffalo, New York,
Of Counsel.

DARK PAGE BLEED THRU

APPENDIX I

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 17th day of September, 1952.

Present—Hon. Marsh N. Taylor,

Presiding Justice.

" Francis D. McCurn,
" Henry J. Kimball,
" R. Foster Piper,
" John C. Wheeler,

Associate Justices.

In the Matter
of
The Application of LAURENCE J. OLMSTED,
An Attorney.

The petitioner herein having duly moved before this Court for an order adjudging that no grounds exist in the opinion of this Court warranting an investigation into certain alleged charges of professional misconduct and alleged conduct prejudicial to the administration of justice, alleged to have been committed by said petitioner, or that this Court make such an investigation, and for other relief.

Now, upon reading and filing the affidavit of Laurence J. Olmsted, verified the 11th day of September, 1952, the notice of motion, together with proof of service thereof

upon the attorney for the Western New York Water Company and the New York Water Service Corporation, and the affidavit of Reid S. Moule, verified the 17th day of September, 1952, and after hearing Mr. Laurence J. Olmsted, petitioner in person, in favor of said motion, and Mr. Reid S. Moule, in opposition thereto, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is, denied. Memorandum: On the basis of the records and papers before us, we see no reason for the inquiry sought by petitioner.

Enter,

MARSH N. TAYLOR.

Entered 24th day of September, 1952.
Herbert E. Wait, *Clerk*.

APPENDIX II

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—FOURTH DEPARTMENT

In the Matter
of
The Application of LAURENCE J. OLMSTED,
An Attorney.

State of New York,
County of Erie,
City of Buffalo. } ss.:

REID S. MOULE, being duly sworn, deposes and says:

1. That he is an attorney representing the Western New York Water Company and the New York Water Service Corporation in the above matter.

2. That said companies take the position that Laurence J. Olmsted should not be permitted to appear for the Erie County Water Authority in a condemnation action brought by it against them.

3. That their position is set forth in the record attached to petitioner's motion papers and marked "Exhibit I", and an additional reason is set forth in Judge Conway's opinion, a copy of which is attached to the moving papers herein and marked "Exhibit II". That said additional reason is that once the condemnation proceedings go to trial, said companies may lose their right to a fair trial if

confidential, privileged information and special knowledge which Laurence J. Olmsted was in a position to acquire while in public employment, is used on behalf of his new client.

4. That your deponent has prepared and filed a record on the Olmsted question with the United States Supreme Court upon which the companies seek a writ of certiorari; that said petition for the writ of certiorari will probably be filed with the United States Supreme Court before the end of this month.

5. That petitioner and the Erie County Water Authority have been assiduous in spreading their claim that the action of the companies in attempting to have Mr. Olmsted removed in the condemnation case is done solely for the purpose of delay. That the Water Authority and its attorneys have further claimed that there is no merit or substance to the companies' claim that Mr. Olmsted is disqualified from acting and that the companies are solely seeking delay.

6. That deponent denies that claims of the Authority and its counsel and maintains that the question raised is of an important, serious nature, which will have a bearing on the entire litigation in the condemnation case.

/s/ REID S. MOULE.

Sworn to before me this
17th day of September, 1952.
/s/ Elsa G. Damm,
Notary Public, Erie County, N. Y.

CERTIFICATION.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y.

I, HERBERT E. WAIT, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the following is a copy of an order made by said court in the within entitled action or proceeding, and entered in this office on the 24th day of September 1952, and of the whole thereof, and do further certify that the affidavit of Reid S. Moule, sworn to on September 17, 1952, is a true copy of the affidavit of Reid S. Moule which was filed in this office on September 17, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at the City of Rochester, this 6th day of November 1952.

HERBERT E. WAIT,
Clerk.

(SEAL)